

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

No. 76-

76-694

Supreme Court, U. S.
FILED

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MICHAEL RUDAK, JR., CLERK

JAMES L. BUCKLEY et al.,
Intervenors-Appellants,
-and-
ISABELLA M. PERNICONE, ESQ.,
as Guardian ad Litem,
Intervenor-Appellant,
-against-
NEW YORK CITY HEALTH AND HOSPITALS
CORPORATION,
Plaintiff-Appellee.

JOSEPH A. CALIFANO, SECRETARY OF HEALTH,
EDUCATION, AND WELFARE, APPELLANT

v.
CORA McRAE, ET AL.

On Appeal from the United States District
Court for the Eastern District of New York

MOTION TO AFFIRM

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MOTION TO AFFIRM

Appellee, New York City Health and
Hospitals Corporation, pursuant to Rule 16

of the Rules of the Supreme Court of the United States, moves that the order of the United States District Court for the Eastern District of New York (Dooling, J.) be affirmed on the ground that the decision below is so obviously correct as to warrant no further review.

STATEMENT

This is a direct appeal pursuant to 28 U.S.C. 1252 from the order entered on October 22, 1976 by the District Court which, upon a finding of probable success as to a challenge to the unconstitutionality of Section 209 of Public Law 94-439, enjoined its enforcement pendente lite.*

On September 30, 1976, Congress enacted into law, as a rider to the Departments of

*Appellee New York City Health and Hospitals Corporation does not doubt this Court's jurisdiction of the matter. McLucas v. DeChamplain, 421 U.S. 21, 31-32 (1975).

Labor, Health, Education and Welfare Appropriations Act, 1977, the Hyde Amendment, which provides:

"None of the funds contained in this Act shall be used to perform abortions except where the life of the mother would be endangered if the fetus were carried to full term."

This provision would deny Medicaid funds to the vast majority of the 250,000 to 300,000 women who last year received abortions financed through the Medicaid program.* If it is to be enforced, it will prevent the thousands of physicians who serve poor women, from providing that treatment which in the judgment of the patient and the physician is most appropriate. It will force the clinics who

*Memorandum from Deputy Assistant Secretary for Population Affairs, DHEW, to House-Senate Conference Committee on Labor-HEW Appropriations Bill (H.R. 14232), on effects of Section 209, June 25, 1976. (App. A., infra).

serve the indigent to make the impossible choice of deciding whether to close their doors to the poor, or to continue to serve the poor up to the point of inevitable bankruptcy. Uncontested affidavits filed by appellees McRae, et al. demonstrated that the Hyde Amendment, before its injunction, had already threatened an imminent crisis for Medicaid-eligible indigent pregnant women who sought abortion sources in that Medicaid providers, apprehensive that the Amendment would effect a partial (the 50% federal share) or total denial of reimbursement for elective abortions, were refusing to schedule or perform scheduled abortions for Medicaid-eligible pregnant women. Thus, enforcement of the Amendment will clearly impose intolerable burdens upon an already overtaxed public hospital system, which will both struggle to provide those abortion ser-

vices unavailable elsewhere, at municipal expense, and be forced to deal with the often tragic consequences of illegal abortion.

Appellee New York City Health and Hospitals Corporation (hereafter NYCHHC),* brought suit on October 1, 1976, to enjoin Defendant, F. David Mathews, Secretary of the United States Department of Health, Education and Welfare, from enforcing the Hyde Amendment on the grounds, inter alia, that:

1) The Hyde Amendment unreasonably interferes with the freedom of the NYCHHC to provide comprehensive and high quality medical care, pursuant to its statutory powers and purposes, to the inhabitants of the City

*The civil actions of Appellees NYCHHC and McRae, et al. were filed together and have proceeded as companion cases throughout the litigation. The District Court has treated the cases as consolidated for purposes of argument and all orders issued.

and State of New York in violation of due process of law as guaranteed by the Fifth Amendment to the United States Constitution;

2) The Hyde Amendment discriminates against the NYCHHC by withdrawing Medicaid reimbursement for abortion services that the municipal hospitals, unlike the proprietary and voluntary hospitals, are obligated to provide to those women desirous of terminating their pregnancies in the first and second trimesters, thus requiring only municipal hospitals to perform services without fees in violation of the equal protection of the laws guaranteed by the due process clause of the Fifth Amendment to the United States Constitution.*

*Appellee NYCHHC also raised claims on behalf of the indigent female population, mainly minority, that it services. For a discussion of those constitutional claims the NYCHHC relied on the briefs filed in the companion case. The specific injuries (footnote cont'd. on following page)

On October 1, 1976, at 10:40 a.m., the District Court, after oral argument in chambers, issued a temporary restraining order and held an immediate courtroom hearing on the preliminary injunction. The District Court reserved decision and extended the temporary restraining order, upon consent of all counsel, an additional ten days, and by order of the Court on October 20 until October 22, 1976.

On that day the District Court issued its "Memorandum and Order" which certified
*(footnote cont'd. from previous page)

alleged to the NYCHHC, as distinct from those to its indigent female population, while not directly ruled upon were acknowledged by the District Court in its discussion of the numerical and financial facts in the affidavits submitted by the NYCHHC, which facts the District Court deemed entirely sufficient to confer standing in this matter upon the NYCHHC. Both the Buckley and the Califano Jurisdictional Statements ignore these specific claims of the NYCHHC (Buckley, 6-7, Califano, 6-7).

No. 76 Civ. 1804 as a class action, pursuant to Federal Rules of Civil Procedure 23(a), (b)(1) and (2), permitted the intervention of the appellants Buckley, et al. and entered a preliminary injunction pursuant to Federal Rules of Civil Procedure (65(a), enjoining enforcement of the Hyde Amendment and directing the DHEW to notify affected governmental agencies and providers that reimbursement for abortions would continue to be provided pendente lite. (Califano Jurisdictional Statement, App. A). The Memorandum and Order also reflect consideration and rejection of all the contentions advanced here by the various appellants as to the impermissibility and impropriety of the preliminary injunction in this matter.

Subsequent to issuance of the preliminary injunction, the Defendant Mathews moved to modify the notice directed by the injunc-

tion to make reimbursement pendente lite subject to recoupment should he ultimately prevail on the merits. The District Court denied this motion in a Memorandum and Order issued October 29, 1976 (Califano Jurisdictional Statement, App. B).

ARGUMENT

The decision of the District Court is plainly correct. In urging this Court to reverse the decision below or, at a minimum, to note probable jurisdiction, appellant Secretary Califano presses only two propositions.

(1)

The first is that the federal action here challenged is immune from attack by these appellees, needy indigent women and licensed providers, concededly the "beneficiaries" of federal Medicaid funds (Califano Jurisdictional Statement, p. 9), on the ground that the interest of these beneficiaries in preventing the withdrawal of federal funds is "far too insubstantial" to allow them to obtain judicial resolution of their grievance. That alleged insubstantiality is grounded on the premise that the

sole issue here is one of reimbursement and whatever default may be caused by the federal action will be cured by independent state financial obligations to the Medicaid provider.

Viewing the problem in the solely fiscal reimbursement framework structured by the Secretary, the response must be to the Secretary's position that state reimbursement obligations, if they indeed do exist, are patently ineffective in preventing the denial of the medical assistance here at issue to Medicaid eligible women when federal support is withdrawn. It is at best "idle" (District Court Memorandum, Califano Statement, p. 21a) to continue to claim as the Secretary does that appellees' plaint is no more than that enforcement of the federal action challenged here may lead some third person, i.e. the State, to exercise a right in a manner to

diminish appellees' economic interests in the face of the uncontested affidavits submitted to the District Court. These affidavits document that, with the threatened withdrawal of federal funds: 1. some states renewed their efforts to deny reimbursement for other than therapeutically necessary abortions; 2. appellees Planned Parenthood and Teran will not and appellee NYCHHC will not long be able to provide elective abortion services; and, most irreversibly, the occurrence of illegal abortions and the seeking of prenatal care simply because Medicaid-eligible pregnant women believed they could no longer get abortions.

Further, the Secretary's argument ignores the reality that the possible existence of state obligations, as yet adjudicated by this Court, in no way

reduces the substantial apprehension of the providers as to reimbursement with the inevitable consequence that the harm to women seeking immediate abortions is "real" and "peculiarly irreparable in kind" (District Court Memorandum, Califano Statement, p. 21a).

Lastly, even the Secretary appears to recognize, despite the existent state Medicaid plans, the harm to appellees here under the Hyde Amendment in the event this Court rules that neither the Constitution nor Title XIX of the Social Security Act requires the states to reimburse the cost of nontherapeutic abortions (Beal v. Doe, No. 75-554 and Mather v. Roe, No. 75-1440).*

*We note that insofar as the Secretary now concedes the harm to appellees if the states are not required to provide the disputed services, the United States at page 9 of its amicus brief to this Court in Beal v. Doe, No. 75-554, has argued that state restrictions denying Medicaid for elective abortions do not violate the Equal Protection Clause of the Fourteenth Amendment.

However, the Secretary differs from the District Court in characterizing appellees' interest in preventing a total denial of reimbursement, by both state and federal governments, of elective abortion services as "reducible to little more than" insubstantiality (Califano Statement, p. 12).

Even if this Court rules that the states cannot refuse to reimburse the costs of nontherapeutic abortions, that ruling, as in Beal v. Doe and Maher v. Roe, is within the context of the federal-state fiscal partnership behind Medicaid legislation. It is by no means clear that the state obligation would extend to more than 50% of the costs, leaving any federal default uncured. Even were it held that states have a constitutional or statutory obligation to bear 100% of the total abortion costs, the Medicaid provider and

beneficiary is undoubtedly injured by being forced to depend entirely on a more limited source of funds for the services to which they claim entitlement. This Court can appropriately take judicial notice of the present ills of the economy which make clear that state dollars, particularly New York's, are not equivalent to federal dollars.

Viewing the problem in more fundamental terms than those of mere reimbursement posed by the Secretary, the injury to appellees resides in the refusal of the federal government to act within the limits of constitutional fairness. As stated by the District Court (Califano Statement, p. 11a):

"It may well be that the state could find funds to assume the responsibility for making the payments, or that private charity could supply the abortion-al services. But that is no more than

to say that if the national government unconstitutionally denies an entitlement, catastrophe need not ensue. The answer is that action if unconstitutional, is not tolerable, and is not made tolerable by the consideration that others make good the harms inflicted by the unconstitutional default. The manifest fact is that Section 209 is calculated to stop the provision of abortifacient services from public funds; it is not calculated to shift the burden of providing medicaid assistance to the states. Cf. Shapiro v. Thompson, 1968, 394 U.S. 618."

Courts have consistently upheld the right to challenge federal action determining standards of reimbursement to the states for services provided to individuals by the beneficiaries of these cooperative federalism programs. Philbrook v. Glodgett, 95 S. Ct. 1893 (1975); Shapiro v. Thompson, 394 U.S. 618 (1968); Aguayo v. Richardson, 473 F. 2d 1090 (2d Cir., 1973); Macias v. Finch, 324 F. Supp. 1252 (N.D. Calif. 1970). Hence, even though injury to particular

individuals may potentially be avoidable by the intervention of state or local administrators, individuals who are placed at risk by a federal regulatory framework which violates constitutional or statutory rights have standing to challenge the legality of the federal framework.

The two cases cited by the Secretary, albeit in reference to another point, support the proposition advanced here, namely, that regardless of the ultimate decision on the merits, state obligations do not shield the underlying federal restriction from review Legion v. Richardson, 354 F. Supp. 456 (S.D.N.Y., 1973), affd. sub nom. Legion v. Weinberger, 414 U.S. 1058 (1973); Kantrowitz v. Weinberger, 388 F. Supp. 1127 (D. D.C. 1974), affd. 530 F. 2d 1034 (C.A.D.C.), cert. den. sub nom. Kantrowitz v. Mathews, No. 75-1522, October 4, 1976.

The District Court is patently correct then in ruling "plain" the standing to sue of the NYCHHC and the other appellee providers. Planned Parenthood of Missouri v. Danforth, 96 S. Ct. 2831 (1976); Singleton v. Wulff, 96 S. Ct. 2868 (1976). We also note that in Singleton, this Court recognized the independent interest which providers have in a Medicaid program structured on a non-discriminatory basis. Consequently, this Court acknowledged the injury to plaintiff doctors and the women whose rights they were asserting when the state refused to pay for nontherapeutic abortion services under its Medicaid program, despite the fact that the doctors were willing to continue providing such services.

II

The second proposition pressed by the

Secretary is simply that appellees possess no due process or equal protection right that would be violated by the enforcement of the Hyde Amendment. In addition to making reference to the well-reasoned opinion of the District Court on this point, we also point to the statement of Mr. Justice Blackmun in Singleton, 96 S. Ct. at 2876, fn. 7, that "For a doctor who cannot afford to work for nothing, and a woman who cannot afford to pay him, the State's refusal to fund an abortion is as effective an 'interdiction' of it as would ever be necessary. Furthermore since the right asserted in this case is not simply the right to have an abortion, but the right to have abortions non-discriminatorily funded, the denial of such funding is as complete an 'interdiction' of the exercise of the right as could ever exist."

Further, we are not talking about the "enhancement" of privacy rights by federal subsidization of their exercise, as the Secretary would urge (Califano Statment, p. 15), but whether the federal government can constitutionally impede the exercise by a single class of women of such a fundamental right of privacy in relationship to abortion by failing to provide poor women with the only means by which they can obtain available, legal and safe abortion services. Boddie v. Connecticut, 401 U.S. 371 (1970). See also Roe v. Wade, 410 U.S. 113 (1973); Eisenstadt v. Baird, 405 U.S. 438, 453 (1972). Some lower courts have found affirmative government obligation so to provide. Klein v. Nassau County Med. Ctr., 347 F. Supp. 496 (E.D.N.Y. 1972), vac. and rem. 412 U.S. 924 (1973), decision

on remand, 409 F. Supp. 731 (E.D.N.Y. 1976), appeal pending No. 75-1749. See also Doe v. Rose, 499 F. 2d 1112 (10th Cir. 1974); Doe v. Westby, 383 F. Supp. 1143 (D.S. Dak. 1974), vac. and rem. 420 U.S. 968 (1975), remand decision, 402 F. Supp. 140 (D.S. Dak. 1975); Planned Parenthood v. Fitzpatrick, 401 F. Supp. 554 (E.D. Pa 1975). The issue here is not the obligation to "relieve all the burdens of poverty" (Califano Statement, p. 16), but the obligation not to interfere through government action with the exercise of a fundamental right.

Nor can the Hyde Amendment be sanctioned as an expression of Congressional interest in the protection of potential human life (Califano Statement, p. 16), which interest this Court has expressly disavowed. Roe v. Wade, supra. Nor,

under the Roe v. Wade rule, can our lawmakers abridge the constitutional right here because of any "taxpayer's moral objection" interest. To acknowledge such an interest would unpardonably sanction the rule of prejudice and opinion of political constituents over the Constitution. Roe v. Norton, 408 F. Supp. 660, 664 (D. Conn. 1975), appeal pending sub. nom. Maier v. Roe, No. 75-1440; Doe v. Rose, 499 F. 2d 1112, 1117 (10th Cir. 1974).

In answer to the contentions advanced by the appellants Buckley et al., we simply put forth the District Court's opinion.

CONCLUSION

Appellee New York City Health and Hospitals Corporation respectfully moves this Court to affirm the order of the District Court on the ground that it is so obviously correct as to warrant no further review.

March 3, 1977.

Respectfully submitted,

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APPENDIX A

Official Statement 6/25/76

Effects of Section 209, Labor-HEW
Appropriations Bill, H.R. 14232

"None of the funds appropriated under this Act shall be used to pay for abortions or to promote or encourage abortions."

This language would affect virtually all programs involved in or related to the provision of medical care as well as those which are concerned with social and education services or benefits funded by the Department of Labor and of Health, Education, and Welfare. Included would be programs such as those of the Bureau of Community Health Services, the Public Health Service Hospitals, social service programs of Aid to Families with Dependent Children and Medicaid.

The program that would be most affected would be the Medicaid program in forty-nine States and the District of Columbia. It is estimated that the Department is currently financing between 250,000 and 300,000 abortions annually at a cost of \$45-\$55 million. The preponderance of funding is through Medicaid. For each pregnancy among Medicaid eligible women that is brought to term, it is estimated that the first-year cost to Federal, State and local governments for maternity and pediatric care and public assistance is approximately \$2200. No information exists for Departmental programs separating thera-

peutic from non-therapeutic abortions.

The provision would also by its terms appear to preclude the use of Departmental funds for therapeutic abortions, even including those to save the life of the mother. This could severely constrain medical schools receiving capitation grants and other HEW funds in instructing students in the performance of abortions, and could preclude any federally supported agencies or projects from counseling clients on the availability of abortion services.

Although the language of the section would clearly preclude the use of Federal funds for abortions under Medicaid, the actual effect upon the delivery of program services is less clear. A number of decisions by the Federal courts have held that a State which provides medical services in connection with pregnancies cannot preclude the pregnant women from choosing abortion (if it is otherwise her lawful right to do so) as the means for terminating her pregnancy. Thus, the effect of the amendment might be not to eliminate abortion service from the program, but merely to require the State to pay the cost without any Federal financial participation. With respect to direct Federal health services--as through the PHS hospitals--the principle of these decisions, if applied, might be to preclude any health services with respect to pregnancy.

Sent by Deputy Assistant Secretary Population Affairs, H.E.W. at the request of the House-Senate Conference Committee on the effects of Section 209 Labor H.E.W. Appropriations Bill, H.R. 14232.